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Subject: Emailing: High Court Weighs Suit Over Cost Recovery Methods Available For PRPs
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Daily News

High Court Weighs Suit Over Cost Recovery Methods Available For PRPs

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The Supreme Court will consider Sept. 24 whether to hear a case on the availability of Superfund law cost recovery mechanisms for private parties who have entered into consent decrees with the government for cleanup response costs, though there are no appellate court conflicts on the issue -- often a key factor for the high court to hear a case.

Several appeals court rulings have restricted potentially responsible parties (PRPs) from making cost recovery claims under section 107 of the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA) -- also known as the Superfund law -- against other parties. But chemical manufacturers Solutia and Pharmacia Corp. are urging the Supreme Court to settle what they say is "extensive confusion" among courts, PRPs and the government on the extent PRPs can use section 107 to recoup costs they have incurred for conducting a cleanup under a consent decree.

The companies July 19 filed a petition for a writ of *certiorari* asking the high court to hear their appeal of the U.S. Court of Appeals for the 11th Circuit's ruling in *Solutia Inc. and Pharmacia Corp. v. McWane, Inc. et al*.

The companies had entered into a consent decree with EPA for cleanup responsibilities for contamination related to polychlorinated biphenyl (PCB) production in Anniston, AL. But the 11th Circuit blocked the companies from pursuing cost recovery claims under section 107. Instead, the court limited the settling parties to bringing contribution claims under section 113(f) of the law. The appeal was a matter of first impression in the 11th Circuit.

If the high court takes the case, it could address a question left unanswered by the Supreme Court in its 2007 decision in *United States v. Atlantic Research*, when it found that section 107 -- cost recovery provisions typically used by government agencies -- could be employed by private parties to recoup cleanup costs. While it held that a PRP that had paid cleanup costs but not been sued could seek section 107 cost recovery against another PRP, it "reserved the issue of whether a PRP that had incurred response costs pursuant to a settlement (e.g., a consent decree or administrative order) could recover under [section] 107(a)," according to the companies' *cert* petition.

The *Atlantic Research* ruling came after the high court created a firestorm in 2004 in *Cooper Industries v. Aviall* when it ruled that liable parties cannot sue to recoup cleanup costs under section 113 of CERCLA -- the usual authority for bringing such lawsuits -- unless they had first been sued by the government. That ruling raised fears among liable parties that it would undercut efforts to promote voluntary cleanups by PRPs.

The *cert* petition asks the high court to answer the question of whether, under CERCLA, "a party who incurs response costs conducting a cleanup under a consent decree may pursue a cost recovery claim under [section]

107(a)(4)(B) or is limited to a contribution claim under [section] 113 (f)(3)(B) as its exclusive remedy?"

Though there is no appeals court split on the issue, the petitioners cite three reasons for granting review: "1) to reconfirm the Court's interpretation of the plain language of CERCLA and the concepts of cost recovery and contribution set out in the Court's ruling in *Atlantic Research*; 2) because the question presented is causing extensive confusion among the courts, parties considering entering into agreements to conduct cleanups, and the United States; and 3) because the availability of [section] 107(a) cost recovery under CERCLA is an issue of exceptional importance relevant to the fundamental goal of CERCLA of encouraging private party cleanups."

The 11th Circuit said a section 107 claim would disadvantage the defendants in the case by imposing joint and several liability against the defendants, who in turn "would then be barred from asserting any [section] 113(f) counterclaims, because Solutia and Pharmacia have already entered into a judicially approved settlement with the EPA." The defendants, which had previously settled with the government, are protected from being sued under section 113 due to the contribution protection afforded under that section for parties who have settled their liability.

But the *cert* petitioners argue that due to the 11th Circuit's bar on their use of section 107 cost recovery mechanisms, they are now prevented "from holding the respondents responsible for the costs they have incurred cleaning up their wastes." Section 107 cost recovery mechanisms are favorable to plaintiffs compared to using section 113 because they contain a longer statute of limitations than section 113 and allow plaintiffs to hold defendants jointly and severally liable for an entire cleanup, as opposed to being only able to hold them liable for an equitable contribution.

Public Policy Concerns

The petitioners argue that the 11th Circuit in its ruling focuses on public policy concerns , while ignoring CERCLA's language. Section 113(f) says PRPs "may seek contribution," but does not say "that they may only seek contribution under that section," the petition reads. "Congress could have expressly provided that [section] 113 limits the availability of claims under [section] 107 but, instead, it chose permissive language."

The decision ignores statutory language "in favor of the perceived policy benefits of making [section] 113(f) the exclusive means for a PRP to recover some or all of its costs incurred in remediating contaminated sites."

Arguing that the issue is causing confusion, the petitioners say "not all courts have followed the herd in limiting a party who incurs response costs pursuant to an administrative settlement or consent order to a [section] 113(f) contribution action," citing for instance a 2010 district court case, where the court, quoting the high court, said a plaintiff's section 107 cost recovery action "neither contravenes the Supreme Court's current interpretation of CERCLA, nor one of [the] act's fundamental purposes."

Lower courts "have struggled with determining whether cleanups are 'voluntary' or 'compelled,'" the petition says, noting the government "is intent on limiting the availability of [section] 107 claims as much as possible after *Atlantic Research*." It says "courts have had to parse through arguments regarding whether a cleanup is 'voluntary' or, alternatively, whether certain types of settlement agreements constitute CERCLA settlements."

In addition, "the trend in the circuit courts encourages parties to wait to conduct cleanups" until EPA issues a unilateral administrative order under CERCLA section 106 -- which is not considered a civil action or settlement under section 113, and therefore allows the party to make a section 107 claim, it says.

In an Aug. 23 article in Marten law firm's newsletter, attorneys Meline MacCurdy and Adam Orford say

whether parties who incur response costs under a consent decree may seek a section 107 cost recovery claim in addition to a section 113 claim is an "important" issue for environmental law practitioners and their clients who are weighing "whether to comply with an order under CERCLA Section 106 or to enter into a CERCLA consent decree. If by doing either one -- as the 11th Circuit held -- such parties are limited to recovery under Section 113, they risk becoming unable to recover from other parties who settle with the United States, unable to impose joint and several liability on other responsible parties, and unable to bring actions at all under a potentially more onerous statute of limitations."

Opposing High Court Review

Respondents in the high court petition, who represent operators of foundry and other industrial operations in Anniston, oppose the Supreme Court taking the case. In a brief filed Aug. 21, they say the petitioners are wrong to claim there is "extensive confusion" among the courts on the issue. "The court of appeals correctly concluded, based on the plain language of CERCLA and consistent with this Court's opinions in *Aviall* and *Atlantic Research*, that [section] 113 provides the exclusive remedy for parties whose claims are addressed by its terms, and such parties may not simply elect to bring an action under [section] 107 instead. Far from 'causing extensive confusion,' . . . , that conclusion has been embraced by *every* court of appeals to decide the question, and the vast majority of district courts."

Further, they point out that the Supreme Court last year denied review of an 8th Circuit ruling in *Morrison Enterprises, LLC v. Dravo Corp.*, which had raised the same question as in the Solutia case.

The respondents cite the high court's conclusions in *Aviall* to support its position. In that decision, the high court rejected the idea a party could bring a contribution action without meeting the preconditions of section 113. It said there was no reason why Congress would specify certain conditions be met under which a party may bring a 113 contribution claim but then at the same time allow contribution actions without mandating those conditions.

"Likewise, there is no reason why Congress would have bothered to attach conditions to [section] 113 contribution rights if petitioners were free to invoke [section] 107 to evade them," the respondents say.

They also reject the argument there is confusion in the courts over whether cleanups are "voluntary" or "compelled," noting in addition that this case does not implicate these issues since the costs the petitioners are seeking to recoup arise out of obligations under a consent decree. And the court of appeals stated that no claims of voluntarily incurred costs were before it, they note. They also argue that the settling respondents "have already paid a 'fair settlement' for lead contamination in Anniston and '*more* than their fair share of cleanup' of PCBs." -- *Suzanne Yohannan* (This e-mail address is being protected from spambots. You need JavaScript enabled to view it)